Filed 5/6/19 P. v. Perdon CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. NORMAN PERDON, Defendant and Appellant.	B285309 (Los Angeles County Super. Ct. No. NA102198)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed; remanded with instructions.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller, Steven E. Mercer and John C. Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Norman Perdon appeals from a judgment entered after a jury convicted him of the first degree murder of Allen Estes and found true the special allegation Perdon personally used a deadly or dangerous weapon (a knife) in the commission of the offense.

Perdon does not challenge his conviction on appeal. Instead, he contends, the People concede, and we agree he is entitled to a hearing on remand under *People v. Franklin* (2016) 63 Cal.4th 261, 283-284 (*Franklin*) to present youth-related mitigating circumstances for purposes of a future youth offender parole hearing under Penal Code section 3051.[1]

Perdon also contends, in a supplemental brief filed after this court decided *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), the trial court violated his rights to due process and equal protection by imposing certain fines and assessments absent evidence of his ability to pay them.

We affirm Perdon's conviction but remand for the trial court to hold a hearing under *Franklin* at which Perdon and the People would have an opportunity to make a record of Perdon's characteristics and circumstances at the time of the offense. On remand the trial court should allow Perdon to present evidence of his inability to pay the court facilities and operations assessments the court imposed. The trial court should also consider whether to allow Perdon to present evidence of his inability to pay the $10,000 restitution fine and the parole revocation restitution fine in the same amount imposed by the court.

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Evidence at Trial*[2]

1. *The prosecution case*

In July 2015 Brittany Carlson was Perdon's girlfriend, and the two lived together in an apartment. At the time Estes and two other people lived in the home. At some time before July, Estes had punched Carlson in the mouth. Perdon and Carlson later purchased two folding knives, one for each of them, for protection.

In the early morning of July 4, 2015 Perdon and Carlson took a walk near their home and encountered Estes sleeping on the street. After a verbal altercation, Perdon kicked Estes in the head multiple times and stabbed him with a knife. Later that morning paramedics were called to the scene and discovered Estes on the ground surrounded by blood. The paramedics determined Estes was dead.

Sometime after the stabbing, a neighbor, Marciela Ascencion, asked Perdon where Estes was. Perdon responded he had "[s]tabbed him to death." Ascencion recorded the conversation on her cell phone, which video was played for the jury. Ascencion had seen Perdon and Estes previously fight, and Perdon said he intended to "get rid" of Estes.

2. *The defense case*

Perdon testified on his own behalf. He recounted that Carlson told him early on July 4 Estes had touched her breast and put his hand down her pants. Perdon described the stabbing

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[2] Because Perdon does not challenge his conviction, we provide a brief summary of the evidence.

and his belief Estes had reached into his pocket for a knife. Perdon testified he stabbed Estes three times.

Perdon described his childhood, in which he had suffered trauma during placements with multiple foster parents. The trauma made him "real protective" over the people he loved. When he was two or three years old, his foster mother punished him by submerging his hand in boiling water, resulting in his fingers becoming permanently fused together into a "hook." Perdon was adopted when he was seven years old. He attended special education classes while in elementary and middle school. He also attended a private high school for students with disabilities.

Carlos Martinez, a retired Kaiser Permanente psychiatric social worker, counseled Perdon when Perdon was five years old. Martinez recalled Perdon was "real shy" and "stuck to the social worker." Martinez learned from a county social worker Perdon has been in approximately 18 to 20 placements. Martinez testified Perdon suffered psychological trauma as a result of his treatment in the foster homes.

Perdon's adopted parents also testified about Perdon's difficult childhood, and noted when Perdon first came to live with them, he was wearing a helmet because he banged his head against the floor. Perdon took medication for his mental issues, and, when he failed to take his medication, he became angry and suffered from delusions.

B. *The Jury Verdict and Sentencing*

The jury found Perdon guilty of first degree murder (§ 187) and found true the special allegation he personally used a deadly

or dangerous weapon in the commission of the murder (§ 12022, subd. (b)(1)).

On August 21, 2017 the trial court sentenced Perdon to a term of 25 years to life for the murder, plus one year for the use of a deadly or dangerous weapon, for an aggregate term of 26 years to life. The trial court imposed a $30 court facilities assessment (Gov. Code, § 70373) and a $40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)). The trial court also imposed a restitution fine of $10,000 (§ 1202.4, subd. (b)) and imposed and suspended a parole revocation restitution fine in the same amount (§ 1202.45). The trial court did not state its reasons for imposing the restitution and parole revocation restitution fines or why it imposed an amount above the $300 statutory minimum. (§§ 1202.4, subd. (b)(1), 1202.45.) Perdon did not at sentencing object to imposition of the assessments and fines or raise his inability to pay.

Perdon timely appealed.

DISCUSSION

A. *Remand Is Necessary for a* Franklin *Hearing on Perdon's Characteristics and Circumstances at the Time of the Offense*

It is undisputed Perdon, who was born on May 21, 1991, was 24 years old at the time he committed the offense on July 4, 2015. Under current law, Perdon will be entitled to a youth offender parole hearing during the 25th year of his incarceration. (§ 3051, subd. (b)(3).) Perdon contends, the People concede, and we agree under *Franklin*, *supra*, 63 Cal.4th at pages 283 to 284, he is entitled to a hearing on remand to make a record of

mitigating factors related to his youth at the time of the offense to be used at the eventual youth offender parole hearing.

Section 3051, subdivision (a)(1), which took effect January 1, 2018, provides for a "youth offender parole hearing" by the Board of Parole Hearings (the board) "for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger . . . at the time of his or her controlling offense." At the youth offender parole hearing, the board is to consider "the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." (§ 3051, subd. (f)(1).) In addition, "[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board." (§ 3051, subd. (f)(2).)

When section 3051 was initially enacted by the passage of Senate Bill No. 260 (2013-2014 Reg. Sess.), it only applied to defendants who committed the controlling offense "before the person had attained 18 years of age." (Stats. 2013, ch. 312, § 4.) Section 3051 was subsequently amended to apply to defendants who were 23 years of age or younger at the time of the controlling offense. (Stats. 2015, ch. 471, § 1.) That version was in effect in 2017, when Perdon committed the murder. Thus, at the time of Perdon's sentencing, he would not have been eligible for a youth offender parole hearing under section 3051, former subdivision (b)(1).

In *Franklin, supra*, 63 Cal.4th at pages 283 to 284, the Supreme Court held a defendant who did not have an

opportunity to make a record of mitigating "youth-related factors" relevant to a later youth offender parole hearing should have an opportunity to make a record on remand. The court explained that sections 3051 and 4801[3] "contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration. . . . Assembling such statements 'about the individual before the crime' is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Franklin, supra*, 63 Cal.4th at pp. 283-284.)

The Supreme Court remanded the matter to determine whether the defendant "was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing," and if not, to allow the defendant to "place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or

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[3] Section 4801, subdivision (c), currently provides, "When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, when he or she was 25 years of age or younger, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."

otherwise bears on the influence of youth-related factors." (*Franklin, supra*, 63 Cal.4th at p. 284; accord, *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1131 [remanding for defendant to supplement record in trial court with information relevant to his later youth offender parole hearing, explaining, "Although a defendant sentenced before the enactment of Senate Bill No. 260 could have introduced such evidence through existing sentencing procedures, he or she would not have had reason to know that the subsequently enacted legislation would make such evidence particularly relevant in the parole process"].)

Here, as the People acknowledge, although Perdon presented evidence at trial of his childhood trauma and mental disability, he presented the evidence to support his defenses of heat of passion and imperfect self-defense. The record does not reflect he had an opportunity to present evidence regarding his characteristics and circumstances that would be relevant in a later youth offender parole hearing. We therefore remand the matter to allow both parties to make a record of Perdon's characteristics and circumstances at the time of the offense, as set forth in section 3051 and *Franklin, supra*, 63 Cal.4th at pages 283 to 284.

B. *Perdon Is Entitled to a Hearing on His Ability To Pay the Assessments*

Perdon requests we remand the case for the trial court to conduct an ability-to-pay hearing in accordance with our opinion in *Dueñas, supra*, 30 Cal.App.5th 1157, because he was indigent at the time of sentencing. We agree Perdon should have an opportunity on remand to request a hearing and present evidence demonstrating his inability to pay the assessments imposed by

the trial court. We leave to the trial court's discretion whether to consider Perdon's ability to pay the $10,000 restitution fine and parole revocation fine in the same amount.

In *Dueñas*, *supra*, 30 Cal.App.5th 1157, 1168, this court concluded "the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed . . . upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." However, in contrast to the assessments, a restitution fine under section 1202.4, subdivision (b), "is intended to be, and is recognized as, additional punishment for a crime." (*Dueñas*, at p. 1169.) Section 1202.4, subdivision (c), provides a defendant's inability to pay may not be considered a "compelling and extraordinary reason" not to impose the restitution fine; rather, inability to pay may be considered only when increasing the amount of the restitution fine above the minimum required by statute. As we held in *Dueñas*, to avoid the serious constitutional question raised by imposition of the restitution fines, "although the trial court is required by . . . section 1202.4 to impose a restitution fine, the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine." (*Dueñas*, at p. 1172.)

1. *We decline to find forfeiture of Perdon's arguments under* Dueñas

In their supplemental briefing, the People contend Perdon forfeited his objections to the trial court's imposition of the fines and assessments because he failed to object to their imposition at sentencing. However, at the time Perdon was sentenced, *Dueñas*

had not yet been decided. As we explained in *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 (*Castellano*) in rejecting this argument, "[N]o California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. . . . When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture." As in *Castellano*, we decline to find Perdon forfeited his constitutional challenge to the imposition of the $30 court facilities assessment and $40 court operations assessment.

The People contend, however, that at the time of sentencing, Perdon had a right under section 1202.4, subdivision (d), to challenge imposition of a restitution fine above the $300 statutory minimum, and the parole revocation restitution fine in the same amount (§ 1202.45, subd. (a)), and therefore we should not remand for an ability-to-pay hearing as to these fines.[4] Section 1202.4, subdivision (d), provides, "In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent

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[4] Although the People assert this argument to support their claim there was no constitutional violation, we treat the People's position as an argument Perdon forfeited his challenge to imposition of the restitution fines by not raising his ability to pay below.

to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime."

Although Perdon failed in the trial court to challenge imposition of the $10,000 restitution fine and parole revocation restitution fine, "neither forfeiture nor application of the forfeiture rule is automatic." (*People v. McCullough* (2013) 56 Cal.4th 589, 593 [finding defendant forfeited challenge to imposition of booking fee where he failed to raise his ability to pay the fee in the trial court]; accord, *In re S.B.* (2004) 32 Cal.4th 1287, 1293 ["application of the forfeiture rule is not automatic," although "the appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue"].)

Because we are directing the trial court to hold an ability-to-pay hearing on remand as to the $30 and $40 assessments, we leave it to the trial court's discretion whether to consider Perdon's ability to pay the $10,000 restitution and parole revocation restitution fines on remand. As the Supreme Court explained in *In re S.B.*, the purpose of the forfeiture rule "is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*In re S.B., supra*, 32 Cal.4th at p. 1293.) Because the trial court will be considering Perdon's ability to pay the assessments, it may also consider whether Perdon has the ability to pay these fines.

2. *On remand Perdon is entitled to an opportunity to challenge imposition of the assessments*

The People contend the record does not support a remand for an ability-to-pay hearing because Perdon failed to show in the trial court he did not have the financial ability to pay the fines

and assessments, and failed to show he lacked the future earning capacity to pay, including from wages he would earn while in prison. The only information in the record regarding Perdon's ability to pay at the time of sentencing is that he was 26 years old, was unemployed, and had an unknown financial status.

The People are correct Perdon must in the first instance request an ability-to-pay hearing and present evidence of his inability to pay the fines and assessments. As we explained in *Castellano*, "[c]onsistent with *Dueñas*, a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court." (*Castellano*, *supra*, 33 Cal.App.5th at p. 490.) However, as discussed in the context of forfeiture, because Perdon was not aware of his ability to challenge the assessments on due process and equal protection grounds, we conclude he should have that opportunity on remand. Further, as noted, on remand Perdon may also request an ability-to-pay hearing on imposition of the $10,000 restitution fine and parole revocation restitution fine in the same amount.

We reject the People's additional contention Perdon has not shown a due process violation because he has not demonstrated adverse consequences from imposition of the fines and assessments. As we explained in *Castellano*, "the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections." (*Castellano*, *supra*, 33 Cal.App.5th at p. 490.)

DISPOSITION

We affirm the conviction but remand for the trial court to afford Perdon and the People an opportunity to make a record of Perdon's characteristics and circumstances at the time of the offense consistent with section 3051 and *Franklin, supra*, 63 Cal.4th at pages 283 to 284. On remand the trial court should allow Perdon to request a hearing and present evidence demonstrating his inability to pay the assessments imposed by the court, and consider whether to allow Perdon to present evidence of his inability to pay the restitution fine and parole revocation restitution fine. If Perdon demonstrates his inability to pay the court facilities assessment and the court operations assessment, it must strike the assessments. If the trial court determines Perdon does not have the ability to pay the restitution fine and parole revocation restitution fine, it must stay execution of the fines.

FEUER, J.

WE CONCUR:

ZELON, Acting P. J.

SEGAL, J.